No. 83-185

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

SYLVIA COOPER, et al.,
Petitioners

v.

FEDERAL RESERVE BANK OF RICHMOND,
Respondent

BRIEF FOR THE BOEING COMPANY AS AMICUS CURIAE SUPPORTING RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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QUESTION PRESENTED

Whether a final judgment against the plaintiff class in a properly certified class action precludes a class member who had notice of the class action and actively participated in it from litigating an individual claim within the range of claims decided in the class suit.

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The Boeing Company submits this Brief as *amicus curiae* with the consent of the parties[1] and urges this Court to affirm the judgment and the holding of the United States Court of Appeals for the Fourth Circuit. That judgment and holding, which faithfully reflect the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure and settled principles of *res judicata*, are

1. Copies of the letters of consent are attached.

under attack by persons who seek to avoid the preclusive effects of final judgments in class actions. Boeing also submits that the present case should be considered in tandem with No. 83-902, *Boeing Vertol Co. v. Edwards*, or with careful attention to the closely related issues presented in that case. The plaintiff in *Boeing Vertol* is seeking to escape the *res judicata* effect of a judgment against his class, and in addition to avoid the collateral estoppel effect of findings of fact and conclusions of law referring to him that were entered in order to decide the class claims.

INTEREST OF AMICUS

In General

The Boeing Company, a worldwide aerospace and diversified manufacturing and services company, employs more than 80,000 people in the United States alone. Boeing has been and is currently a defendant in class action litigation, and like other prevailing class action defendants, Boeing has been and expects again to be confronted with suits brought by members of unsuccessful plaintiff classes who seek to evade the class action findings, conclusions, and judgments.

The Directly Pertinent Boeing Vertol Case

A major operating division of The Boeing Company is a defendant in No. 83-902, *Boeing Vertol Company v. Edwards* (petition for certiorari filed November 29, 1983). In *Boeing Vertol*, as in the present case, a member of the plaintiff class in an unsuccessful employment discrimination class action has brought an individual claim encompassed by the earlier judgment against the class. The plaintiff in *Boeing Vertol* is also attempting to collaterally attack specific findings of fact and conclusions of law that were necessarily entered in order to decide the class claims.

In the prior class action case at issue in *Boeing Vertol*, the United States District Court for the Eastern District of Pennsylvania entered a final judgment and held that The Boeing Company had not unlawfully discriminated against a class consisting of certain Black employees in promotions and other employment decisions in the period from 1965 to 1975. *Croker v. The Boeing Company (Vertol Division)*, 437 F. Supp. 1138 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (CA3 1981) (*en banc*).

The plaintiff class in *Croker v. Boeing* presented both statistical and anecdotal evidence of alleged discrimination. The anecdotal evidence consisted of testimony of class members concerning "illustrative individual acts of alleged discrimination." The testimony of class member John F. Edwards was offered for the avowed purpose of establishing that as an illustrative individual victim of the supposed discrimination against the class, he had been denied a promotion to Supervisor in "production and maintenance" because of his race.

In the *Croker v. Boeing* case, as in the class action case underlying the case at bar, the class action court weighed the testimony concerning "illustrative acts" in deciding the class claims, and determined that there had been no pattern or practice of discrimination of certain specific types — one of which in *Croker v. Boeing* was promotions to Supervisor in "production and maintenance" positions from 1965 to 1975. The court in *Croker v. Boeing* also made specific findings of fact and conclusions of law with respect to the anecdotal evidence, including findings and conclusions discrediting Edwards' testimony and holding that "any inference of discrimination" had been rebutted as to him. 437 F. Supp. at 1176, 1197. The Third Circuit affirmed the findings, the conclusions, and the judgment against the class. 662 F.2d 975, 993-95.

Three and a half years after the entry of the judgment against the class, Edwards brought an individual

suit in the same district court. Echoing his testimony in the class action case, Edwards alleged that he had been discriminatorily denied a promotion to Supervisor in the period from 1965 to 1975. Beginning with its first filing and continuously thereafter, Boeing defended on the grounds of *res judicata* and collateral estoppel as well as on other grounds.[2]

Reserving judgment on *res judicata* and collateral estoppel, the District Court permitted the case to proceed to trial. Boeing once again prevailed on the merits of all of Edwards' claims. The District Court therefore had no occasion to reach the issues of *res judicata* or collateral estoppel.

The Third Circuit reversed in the decision that is presently before this Court in No. 83-902. The Third Circuit first held that the District Court had committed errors that would require a new trial unless trial was precluded by the *Croker v. Boeing* decision.[3] The Third Circuit then held that neither *res judicata* nor collateral estoppel was available to Boeing. The Third Circuit reasoned that as a class member who was neither a named plaintiff nor an intervenor, Edwards had not individually had an opportunity for appellate review. *Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 767 (CA3 1983). The Third Circuit's decision conflicts with the Fourth Circuit decision in the case at bar.[4]

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2. Unlike the plaintiffs in the case at bar (see part II(2) of the Brief for Petitioners), Edwards has never asserted that Boeing waived any defenses.

3. The Third Circuit held, *inter alia*, that the District Court should have allowed tolling of the statute of limitations for the full duration of the class action case, even though Edwards had waited more than eight years after class certification before purporting to renounce the class case and pursue an individual suit. The correctness of that holding, which is squarely contrary to decisions of other Courts of Appeals, is a distinct issue presented for review in the Petition for Certiorari in No. 83-902.

4. The decision of the Fourth Circuit in the present case was called to the Third Circuit's attention in the briefs and at oral argument, but the Third Circuit opinion does not mention the Fourth Circuit case.

The Boeing Company believes that awareness of the distinct but closely related issues presented by *Boeing Vertol v. Edwards* — the propriety of class members' attacking unfavorable class action judgments and the findings of fact and conclusions of law that have been entered in order to issue those judgments — may provide this Court with a perspective useful in reaching a decision that preserves the purposes of the doctrine of *res judicata*, is faithful to the policies of the amended class action rules, and advances considerations of judicial efficiency.

SUMMARY OF ARGUMENT

Members of a properly certified plaintiff class should be precluded from filing individual suits which present claims that have been decided against the class or that could have been presented in the class case. Exceptions are warranted only for class members who have been demonstrably prejudiced by improper application of Rule 23. In other words, in the absence of improper class certification, inadequate notice, or inadequacy of representation, a prior judgment against a class should be an absolute bar to claims within the range of the class claims. That conclusion is compelled by the class action rules and by settled principles of *res judicata*.

ARGUMENT

The Fourth Circuit Correctly Held That Absent Inadequate Notice Or Inadequate Representation, A Judgment Against A Plaintiff Class In A Class Action Case Precludes Members Of The Class From Litigating Individual Claims In Categories Ruled Upon In The Class Case

The Fourth Circuit has held in the present case that a class member "seeking relief individually on charges of discrimination within the charges determined in the class action is precluded by *res judicata* from maintaining subsequently an individual action claiming discrimination in a particular ruled on in the class action." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 674 (CA4 1983). The Fourth Circuit has recognized exceptions for cases in which the class certification is found to have been improper, where notice has been inadequate, or where there has been inadequate representation of the class members who are not named parties.[5] The Fourth Circuit correctly interpreted and applied settled class action rules and principles of *res judicata*.

This Court has long recognized, as "familiar doctrine," that members of a plaintiff class "not present as parties to the litigation may be bound by the judgment when they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties." *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). In consequence, since they are bound by the judgment, the class and its members are precluded from asserting claims that were or could have been asserted in the class action. *See, e.g., Restatement (Second) of Judgments* §19 (1982).

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5. There was no such deficiency here. Indeed, the record shows that the plaintiffs in this case were especially active participants who even testified about their own supposed circumstances in the unsuccessful class action case.

In the present case, neither petitioners nor the Equal Employment Opportunity Commission appear to contend that class actions are a species unto themselves for purposes of *res judicata* and collateral estoppel. Nor could they; the fundamental premise of a class action is that class members who are not formal parties, but who are adequately represented or who actually participate, are legally present through the class representatives and, as a consequence, are in the same legal position as named parties. *Hansberry v. Lee, supra; e.g., Adams v. Proctor & Gamble Co.*, 697 F.2d 582, 583-84 (CA4 1983); *Goff v. Menke*, 672 F.2d 702, 704 (CA8 1982); *Laskey v. United Automobile Workers*, 638 F.2d 954, 956-57 (CA6 1981); *Byrd v. Prudential Ins. Co.*, 30 FEP Cases 304, 305-06, 30 CCH EPD ¶33,195 at pp. 27,724 to 27,726 (S.D. Tex. 1982).

The EEOC and petitioners do, however, appear to be arguing for a waiver of this principle in employment discrimination class actions. Because isolated acts of discrimination can exist without a class-wide pattern or practice of discrimination, they contend that the individual claims, which were combined at their behest in order to create a class action, can thereafter be disaggregated to avoid the preclusive consequences of an adverse judgment against the class. *See, e.g.*, EEOC amicus brief at 12-13. This reasoning, however, totally disregards the concept of representative litigation and the doctrine of *res judicata*. The class action is not a substantive or independent cause of action; it is a procedure by which individual claims are joined and through which relief may be obtained or not for each class member in accordance with the court's judgment. There is no alternative remedy for such properly conjoined claims outside of or in addition to the class action. To the contrary, such individual claims are merged in and barred by the judgment in the class case. Were it otherwise, as petitioners and the EEOC contend here, then Rule 23 and the doctrines of *res judicata* and claim preclusion promote years of

complex and costly litigation on a false promise of ultimate economy to the courts and litigants alike.

The flood of stale and repetitive individual claims that petitioners would permit runs exactly contrary to the result intended by the fundamental restructuring of Rule 23 of the Federal Rules of Civil Procedure which this Court adopted in 1966. 383 U.S. 1031. Prior to 1966, Rule 23(a)(3) permitted a so-called "spurious" class action in cases involving common questions of law or fact and seeking common relief. The judgment in a "spurious" class action bound only named parties and intervenors and excluded other class members.[6] It has been said of the aptly named "spurious" class action that "[w]hen a suit was brought by . . . such a class, it was merely an invitation to joinder — an invitation to become a fellow traveler in the litigation, which might or might not be accepted." 3B J. Moore, *Federal Practice & Procedure* §23.10[1] at page 26-2603 (1982).

In practice under the pre-1966 class action rules, however, the lower federal courts often permitted class members to intervene after a decision on the merits favorable to their interests. The consequence, as this Court noted, was that "members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974). Not only was an unsuccessful defendant typically deluged with intervenors seeking an effortless path to relief; he was also precluded from redefining and reasserting his defenses against these intervenors. But the converse was not true. A defendant who had actually litigated issues common to the class against the class representatives, who had sustained the additional and often staggering costs of defending class

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6. Advisory Committee Notes to 1966 Amendments to Rule 23(c)(3), Fed. R. Civ. P.

litigation, and who had ultimately prevailed, was not awarded *res judicata* commensurate with the degree of preclusion he had risked. He was protected only from suits brought by named parties and those who had chosen (unnecessarily) to intervene before judgment.

The "spurious" class action and the "one-way intervention" tolerated by certain courts were much criticized on the ground that "it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." Accordingly, the 1966 amendments were designed "specifically to mend this perceived defect in the former Rule [*i.e.*, to preclude any possibility of one-way intervention] and to assure that members of the class would be identified *before* trial on the merits and *would be bound by all subsequent orders and judgments*." *American Pipe*, 414 U.S. at 547 (emphasis supplied).

The cornerstone of the 1966 amendments is Rule 23(c)(3), which determines exactly who is bound by the judgment in a class action.[7] The draftsmen explained the effect of Rule 23(c)(3) as follows:

> "The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice provided by subdivision (c)(2) was directed,

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7. Rule 23(c)(3) provides:

"The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

> excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. *The judgment has this scope whether it is favorable or unfavorable to the class.*"

Advisory Committee Notes to 1966 Amendments to Rule 23(c)(3), Fed. R. Civ. P. (emphasis supplied). After class certification, class members "are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse." *American Pipe*, 414 U.S. at 549.

The companion subsections to 23(c)(3) as reformed in 1966 provide standards specifying which cases are eligible for class action status, qualifications for class action representatives, and provisions for court supervision of class counsel and trusteeship over the conduct of class actions. See Rules 23(a)-(b). The amended Rule 23 further requires advance judicial determination, as soon as practicable after the commencement of an action brought as a class action, of whether the case is properly triable as a class action. See Rule 23(c)(1). The thoroughly utilitarian purpose and effect of the amended Rule 23 is to balance fairness to the class members and opposing parties while at the same time promoting the social benefits of representative litigation.

A member of a plaintiff class is afforded significant incentives to pursue his claim through the class action device: spreading and sharing the costs of litigation, pooling of resources, economies of scale in methods of practice and proof, the availability of a presumption that could convert an otherwise marginal individual claim into a successful one, the benefit of special court supervision of counsel and of the case, and the natural cumulative effect of multiple plaintiffs' claims in tending to persuade the trier of fact of the merits of any one.

To obtain those substantial advantages, however, Rule 23 anticipates some subordination of the class

member's individual interests to the interests of the class as a whole. He is required to rely on and abide by the class representatives' strategic and tactical decisions, with the risk that the representatives may emphasize or deemphasize a particular argument or may adduce proof with respect to his own individual situation which is less detailed than if that individual had brought an individual suit.[8] Still, the representative must faithfully represent the individual's interest and the courts will supervise adherence to that obligation. *See, e.g., Mandujano v. Basic Vegetable Co.*, 541 F. 2d 832 (CA9 1976).[9]

The cost-benefit balance is intended to be of roughly equal fairness to defendants. In return for running the risk of an adverse judgment that would give every member of the class a shortcut to relief, and for sustaining costs and risks that tend to exceed by far the costs and risks of defending substantially fewer individual claims, the defendant in a properly certified class action can be assured that the dispute on the merits will be resolved and that liability will be either foreclosed or defined.

The position advocated by petitioners and the EEOC in this case cannot be reconciled with the utilitarian balance of social and private interests struck by the 1966 amendments to Rule 23. In the first place, the pri-

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8. Assuming typicality, the requirement that the class member shall accept the consequences of the class representatives' decisions — whether or not he personally agrees with those decisions — is consistent with the principle of majority rule that so pervades our law. It is consistent, for example, with the policies of the Labor Management Relations Act under which an individual employee may have as his exclusive collective bargaining agent a union for which he did not vote, and under which (absent inadequate representation) he typically may not litigate individual grievances against his employer without union approval.

9. Even after an adverse judgment in the class case, a class member may still pursue his individual claim if he can establish that the class representatives' representation of him was not adequate (i.e., that his claims are atypical).

mary impetus for representative litigation procedures was to avoid multiple litigation and promote judicial efficiency. Petitioners' proposed rule, however, would undoubtedly increase the workload of the federal courts without any corresponding benefit to the public interest. If, as petitioners and the EEOC contend, a decision against a plaintiff class leaves individual class members free to litigate claims in categories reached by the class action, many of the thousands of class action cases now pending in the Federal courts[10] will be but preludes to hosts of individual suits — which will by definition involve stale claims. Petitioners' proposed rule would also upset the balance struck by the draftsmen in Rule 23, would disserve the public interest, and would be grossly unfair to defendants.

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10. As of June 30, 1982, there were 3,263 class action cases pending in the United States District Court. In the immediately preceding fiscal year, 1,238 new class action cases had been filed. *Annual Report of the Director of the Administrative Office of the United States Courts* 125 (1982).

CONCLUSION

The much-publicized abuses and unfairness inherent in "one-way intervention" were addressed by the 1966 amendments to Rule 23. In this case, however, the EEOC and petitioners are attempting to restore "one-way intervention" packaged as one-way *res judicata*.

The holding and the judgment of the United States Court of Appeals for the Fourth Circuit, which are compelled by the letter and the intent of the amended Rule 23 and the doctrine of *res judicata*, should be affirmed.

Respectfully submitted,

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January 4, 1984

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Dear Jack:

I consent to your filing a brief *amicus curiae* in the case, *Sylvia Cooper v. Federal Reserve Bank of Richmond*, U.S. Supreme Court No. 83-185.

Happy New Year.

Sincerely,

/s/ JACK GREENBERG

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January 10, 1984

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Re: Baxter, et al. vs. Federal Reserve Bank of Richmond, No. 83-185

Dear John:

On behalf of the Respondent, we consent to your filing an amicus curiae brief in the above referenced matter.

Very truly yours,

MOORE, VAN ALLEN AND ALLEN

/s/ GEORGE R. HODGES

George R. Hodges

GRH/sf